

Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Declaratory Ruling that)
Pulver.com's Free World Dialup)
Is neither Telecommunications nor a)
Telecommunications Service)

WC Docket No. 03-45

Reply Comments of the Minnesota Department of Commerce

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_____/s/_____
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I. Background

On February 5, 2003, pulver.com (“Pulver”) filed a petition for declaratory ruling with the Federal Communications Commission (“Commission”) requesting that the Commission find its Free World Dialup (“FWD”) service is neither telecommunications nor a telecommunications service as those terms are defined in section 153 of the Telecommunications Act of 1996. On February 14, 2003, the Commission issued a Public Notice establishing a pleading cycle for comments and assigning the above docket to the proceeding.

The Minnesota Department of Commerce (“MNDOC”) files these reply comments to share concerns of some of the commenters that 1) granting Pulver’s request for a declaratory ruling in its favor is premature, given that the Commission is addressing similar issues in other dockets; and 2) there is not a fully developed factual record from which to address Pulver’s request.

II. Current Open Dockets Pending Before the Commission Should be Addressed Before the Commission Should Consider the Current Petition.

As several commenters point out, the Commission is currently addressing the regulatory framework for VoIP services in other proceedings (the “Broadband Proceedings”).¹ In so doing, the Commission must examine significant policy decisions, such as the impact on universal service and the applicability of the Communications Assistance for Law Enforcement Act (“CALEA”).²

The Commission’s rulings in the Broadband Proceeding may also significantly affect states’ abilities to protect their residents. A VoIP service that is deemed not to be “telecommunications” or a “telecommunications service” may be free from providing its customers with important state protections, including but not limited to:

- 911 service³
- Slamming⁴
- Encouraging telephone access to disabled consumers⁵
- Protection from disconnection except for cause⁶

¹ See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, CC Docket No. 02-33, Notice of Proposed Rulemaking, rel. Feb. 15, 2002; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, CS Docket No. 02-52, Notice of Proposed Rulemaking, rel. March 15, 2002.

² See Comments of The Department of Justice and Federal Bureau of Investigation, WC Docket No. 03-45, DA 03-439, p.3.

³ See chapter 403, Minnesota Statutes, which requires telecommunications providers to provide 911 service.

⁴ Minn. Stat. §237.661

⁵ Minn. Stat. §§ 237.70, 237.52.

⁶ Minn. Rules parts 7810.1800, 7810.1900.

A ruling in the current docket before the Commission resolves the Broadband Proceedings could cause confusion and problems for states.⁷ As such, the Commission should not take lightly any provider's request to remove itself from those responsibilities.

III. The lack of a fully developed factual record limits the effect of any ruling the Commission would make in this proceeding.

The MNDOC agrees with commenter SBC Communications, Inc. ("SBC") that enough information is not known about Pulver's service to make a fully effective and accurate ruling.⁸ The MNDOC also shares the concerns of commenters Verizon and Bellsouth that Pulver's website suggests that it is providing a telecommunications service, while its petition to the Commission argues that it is not.⁹

In advertising the FWD service, Pulver's website states, "Can I make free calls using a normal phone? YES!"¹⁰ The website further states, "No more per-minute charges or monthly fees. **If you have broadband access**, you simply signup, get configured, and begin enjoying telephone communications *the way they should be*. Free."¹¹

A consumer reading Pulver's website may initially conclude that the service functions no differently than the service provided by a standard telecommunications carrier. In particular, the use of the words "telephone communications" on the site suggest to the average consumer that it is a telecommunications service. Further representations on the website indicate that the service is marketed to replace additional telecommunications services. For example, the website states, "Save on purchasing more phone lines for your sons and/or daughters."¹² While Pulver states in its petition that FWD does not use telephone numbers, its website states, "...your FWD number is a phone number, your phone number for free phone calls over Broadband!"¹³

While Pulver emphasizes in its petition that the service can only be used by other FWD members, as other commenters point out, Pulver has plans to enable *any* caller to call FWD members¹⁴ (presumably using the Public Switched Telephone Network), and to charge for the service.¹⁵ This anticipated change in the service makes it even more likely

⁷ Minnesota is currently experiencing such problems. For example, a VoIP provider that advertises "an all-inclusive home phone service that replaces your current phone company," provides number portability and assigns telephone numbers to its end users, has refused to apply for certification with the Minnesota Public Utilities Commission, claiming that it is providing "information services." The provider also does not provide access to 911 and argues that it is exempt from providing 911.

⁸ Opposition of SBC Communications, Inc., WC Docket No. 03-45, DA 03-439, p.1.

⁹ Comments of BellSouth, WC Docket No. 03-45, p.7, ft.22; Comments of Verizon, p. 3.

¹⁰ This representation appears to be different from Pulver's statement in its petition that customers must use CPE different from standard CPE to use the service. See Pulver Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service, filed February 5, 2003 ("Pulver Petition"), p.4.

¹¹ <http://www.pulver.com/fwd/index.html>, accessed March 3, 2003. Emphasis in original.

¹² Id.

¹³ Id.

¹⁴ See SBC Opposition at 2.

¹⁵ See BellSouth comments at 4, ft. 13.

for FWD to be a partial or even full replacement for traditional telecommunications service in the future.¹⁶

The Commission should consider very seriously whether a provider should be able to imply to the public that it provides telephone service, while simultaneously asking the Commission to declare that it is not. The Commission expressed this exact view in its recent Notice of Proposed Rulemaking¹⁷:

“We believe the statute and our precedent suggest a functional approach, focusing on the nature of the service provided to consumers, rather than one that focuses on the technical attributes of the underlying architecture.”

¹⁸ (para. 7)

If the Commission elects to issue a ruling in this docket after the resolution of the Broadband Proceedings, it should first seek further information from Pulver to resolve the apparent discrepancy between Pulver’s representations to the public and its petition to the Commission. While deregulatory policies are appropriate in some circumstances, they should not be used in a way that misleads consumers and deprives consumers of regulatory protections intended to further the public interest. Pulver argues that a declaratory ruling in its favor is necessary to provide “pro-consumer” benefits¹⁹. It is not pro-consumer for consumers to believe that they are subscribing to a telecommunications service (for which consumers expect higher standards of protection), only to find out later that they have not.

The MNDOC supports the Commission’s view that the technology used should not determine whether a telecommunications service is being provided. VoIP is in fact being deployed by telecommunications providers for the provision of telecommunications services. Thus, while the Pulver service is not currently used to connect members to non-members, the same technology can be used to do so, as is currently done by telecommunications providers. Should the Commission choose to make a decision on the Pulver petition at this time, it should adopt a recommendation that both protects consumers and preserves the Commission’s view on technology neutrality.

IV. Conclusion

¹⁶ As previously noted, the MNDOC is already aware of VoIP providers in Minnesota advertising their service as a full replacement to traditional telephone service. See footnote 7.

¹⁷ See CC Docket Nos. 02-33, 95-20, 98-10, rel. Feb. 15, 2002.

¹⁸ This view would seem to discount Pulver’s argument that it is not providing a telecommunications service. For example, a cable provider that elects to offer local and/or long distance telephone service is subject to state certification requirements and all related obligations, such as access to 911; the Commission has never ruled that two-way voice communications provided by a cable provider are a cable service. Similarly, Pulver provides two-way voice communications; merely because it provides the service through the use of internet protocol (IP) does not make it an unregulated internet service.

¹⁹ Pulver Petition, p.8.

For the above reasons, the Commission should decline to declare that Pulver's FWD service is not "telecommunications" nor a "telecommunications service" at this time. It should first comprehensively examine the implications of deregulating voice communications services in its other ongoing proceedings, and request further information from Pulver. Should the Commission choose to make a recommendation on the petition prior to further examination, it should find that the use of VoIP technology does not define the service being provided. Further, it should confirm that any service used to connect to any user of the public switched telecommunications network is a telecommunications service.